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Press Release (<u>R-2688</u>): Jane North is Appointed Regional Attorney of NLRB Winston-Salem, NC Office

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Airo Die Casting, Inc., A Subsidiary of Leggett & Platt, Inc. (6-CA-34937, et al.; 354 NLRB No. 8) Loyalhanna, PA, April 29, 2009. In this case, the Board reversed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by subcontracting bargaining unit work without first notifying and bargaining with the Union. The Board found that the judge had erred in finding that the subcontracting violated the parties' contractual prohibition against subcontracting work when employees were on layoff. The Board further found that the Respondent was privileged to unilaterally subcontract the work because the Union had clearly and unmistakably waived its statutory right to bargain over that issue. [HTML] [PDF]

In the absence of exceptions, the Board affirmed the judge's dismissal of the complaint allegation asserting that the Respondent violated Section 8(a)(3) and (1) by failing to immediately reinstate two employees following a unit-wide economic strike.

(Chairman Liebman and Member Schaumber participated.)

Charges filed by Individuals and Factory Workers Laborers' Local 1357; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Pittsburgh, Aug. 7-10, 2006. Adm. Law Judge Paul Bogas issued his decision Dec. 20, 2006.

Akal Security, Inc. (19-CA-30891, et al.; 354 NLRB No. 11) Boise, ID and Coeur d'Alene, ID, April 30, 2009. The Board reversed the administrative law judge's finding that the Respondent violated Section 8(a)(1) by discharging two court security officers, Lee Ryan and Stephen Winther, because of their protected concerted activity. [HTML] [PDF]

The Respondent contracts with the United States Marshals Service (USMS) to provide security services at federal courthouses. The Respondent employed the alleged discriminatees, Lee Ryan and Stephen Winther, as court security officers (CSOs) at the Coeur D'Alene courthouse. The Union represented the Coeur D'Alene CSOs. CSOs cannot work in the courthouse without credentials, which are issued by the USMS.

In the months leading up to the discharges, Ryan and Winther became concerned that a fellow CSO, Bill Lopez, was having performance problems that jeopardized the other CSOs' safety. Ryan and Winther complained to their supervisor, who advised them to talk to Lopez and to start documenting their concerns. Without supervisory permission, Ryan and Winther convened a 30-minute meeting with Lopez and the other CSOs during working time to confront Lopez about his perceived performance problems. Although Ryan's and Winther's supervisor had advised them to talk to Lopez, he had not given permission for them to convene a meeting on working time. Upon learning about the meeting, the Respondent notified the USMS and conducted an investigation, concluding that Ryan and Winther had violated the CSOs' performance standards by, inter alia, harassing and intimidating Lopez during the meeting and neglecting their duties while the meeting took place. The Respondent recommended that Ryan and Winther be suspended, but the USMS insisted that Ryan and Winther be removed from working under its contract with the Respondent. The Respondent then terminated Ryan and Winther.

The judge, applying *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), found that the purpose of the meeting with Lopez was protected. She found that Ryan and Winther did not lose that protection, rejecting the Respondent's arguments that the meeting constituted harassment and violated the Respondent's chain-of-command procedures. She found that the alleged harassment was the "dominant basis" for the discipline, and that it was therefore unnecessary to decide whether Ryan and Winther lost protection by abandoning their assigned posts or neglecting their duties. The judge concluded that the terminations were based on a mistaken belief that Ryan and Winther engaged in misconduct in the course of their protected activity, and that the terminations therefore violated Section 8(a)(1).

The Respondent excepted on several grounds: that the judge's application of *Burnup & Sims* altered the General Counsel's theory of the case and deprived the Respondent of due process, that Ryan's and Winther's activity was unprotected, that the Respondent merely implemented a removal decision made by the USMS and therefore was not responsible for the discharges, and that the judge's remedy was inappropriate.

The Board rejected the Respondent's due process argument. Based on statements made at the hearing and in the Respondent's post-hearing brief, the Board found that the Respondent clearly anticipated that *Burnup & Sims* could apply and litigated accordingly.

However, the Board found merit in the Respondent's contention that Ryan and Winther lost the protection of the Act. The Board agreed that the purpose of the meeting was protected, but disagreed with the judge's findings that harassment was the "dominant basis" for the discipline and that it was unnecessary to address the alleged neglect of duties. With respect to the alleged neglect of duties, the Board noted that the Respondent's investigative report found that Ryan and Winther had created a security risk by convening a meeting of the CSOs in the courthouse's control room during operational hours, from which point they could not fully and effectively monitor the courthouse. The Board found that the Respondent had a good-faith belief that Ryan and Winther had engaged in such misconduct, and that the General Counsel failed to prove that the misconduct did not occur. Accordingly, the Board dismissed the allegations that the discharges of Ryan and Winther violated Section 8(a)(1). Having dismissed the discharge allegations on that basis, the Board found it unnecessary to pass on the Respondent's other arguments.

In the absence of exceptions, the Board adopted the judge's finding that the Respondent violated Section 8(a)(1) by threatening employees with discharge if they spoke to the Board agent investigating the case and by directing employees not to speak to anyone regarding employees' discharges.

(Chairman Liebman and Member Schaumber participated.)

Charges filed by United Government Security Officers of America, Local 118; complaint alleged violations of Section 8(a)(1). Hearing at Coeur d'Alene, May 13 and 14, 2008. Adm. Law Judge Lana H. Parke issued her decision Sept. 23, 2008.

Fortuna Enterprises L.P. a Delaware Limited Partnership d/b/a the Los Angeles Airport Hilton Hotel and Towers, (31-CA-27837, et al.; 354 NLRB No. 17) Los Angeles, CA, April 30, 2009. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing written warnings to five employees for allegedly violating the hotel policy about being in an unauthorized area. The Board found it unnecessary to pass on whether the warnings separately violated Section 8(a)(1) because that finding would not materially affect the remedy. Member Schaumber agreed with the judge's finding that the Respondent disparately applied its new Use of Location Policy to the employees and used it as a pretext to discipline known union supporters who did not even violate the policy. He found it unnecessary, therefore, to consider the adequacy of the Respondent's investigation of the employees' conduct as evidence of discriminatory motivation. [HTML] [PDF]

The Board also adopted the judge's findings that the Respondent committed multiple violations of Section 8(a)(1) by interrogating and threatening employees, denying hotel access to employees wearing union insignia, issuing a written warning to employee Contreras for engaging in protected activity, and suspending 77 employees for engaging in a two-hour protected concerted work stoppage in the employee cafeteria in an effort to discuss a co-worker's suspension with senior management. Member Schaumber believed that the length of the work stoppage in the cafeteria and the potential for interference with the provision of services there made this a close case. However, he recognized that Board precedent supports the judge's finding that the unrepresented employees did not lose the protection of the Act, particularly when the Respondent's officials failed to make it clear that the employees would not be able to meet with senior management at that time and would have alternative opportunities to present their concerns.

In affirming the findings that the Respondent unlawfully interrogated and threatened employees, the Board found it unnecessary to pass on the judge's findings of other similar violations as they would be cumulative and would not materially affect the remedy. In agreeing with the judge that Contreras was unlawfully warned for displaying posters protesting customer harassment of employees, the Board found it unnecessary to rely on his finding that no one complained about the posters during the brief time they were displayed. In affirming the finding that employees were unlawfully suspended for the work stoppage, the Board did not rely on the judge's characterization of General Manager Coonley and Director of Food and Beverages Cook as having "chosen" not to listen to the employees' concern.

However, the Board found that the judge did not provide an adequate basis for review of his finding that Banquet Chef Burciaga violated Section 8(a)(1) by physically pushing three employees away from employees engaged in protected concerted activity and by pushing his finger into the chest of a fourth employee when he protested Burciaga's action. Burciaga denied touching the three employees and denied raising his hands toward the fourth employee. Another manager, who was present during this incident, did not testify, but the Respondent's investigatory notes of his version of the incident were admitted into evidence.

The judge discredited Burciaga's denials of physical contact with the employees because the notes of the other manager's version contradicted that testimony. But the judge did not make any express findings about (i) the credibility of the two employee witnesses based on their demeanor, (ii) differences in their accounts of the incident, and (iii) differences between their accounts and the notes of the other manager's version. In the absence of detailed factual findings and credibility resolutions, the Board was unable to resolve the Respondent's exceptions to the judge's finding that Burciaga acted unlawfully. The Board severed and remanded this issue to the judge for him to reconsider the record evidence, make credibility determinations, and provide an analysis explaining the basis for his findings.

(Chairman Liebman and Member Schaumber participated.)

Charges filed by UNITE HERE Local 11; complaint alleged violations of Section 8(a)(1) and (3). Hearings at Los Angeles, April 14-18 and 21-25, May 12-15, and June 2-4, 2008. Adm. Law Judge John J. McCarrick issued his decision Oct. 21, 2008.

Hartford Head Start Agency, Inc. (7-CA-51106; 354 NLRB No. 15) Detroit, MI, April 30, 2009. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union with respect to the Respondent's proposal to reduce the work schedules of unit employees from 12 to 10 months and to spread their 10 months' wages over a 12-month period; and by unilaterally implementing this proposal. The Board deleted, in the absence of a majority to affirm, the judge's recommended special remedy requiring the Respondent to read the notice to the assembled employees and to pay travel expenses for off-duty employees to attend the reading. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charge filed by Service Employees Local 517M; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Detroit, July 28-31, 2008. Adm. Law Judge John H. West issued his decision Nov. 12, 2008.

Laborers Local 79 (29-CC-1564, 1566; 354 NLRB No. 14) Brooklyn, NY, April 30, 2009. The Board adopted the administrative law judge's findings that the Union unlawfully threatened to picket and shut down a neutral employer's jobsite in order to pressure the neutral employer to cease doing business with another employer with whom the Union had a primary labor dispute. The Union argued that two Federal Circuits have rejected Board precedent, applied by the administrative law judge, holding that unqualified threats to picket at a common situs are unlawful and that a union has an affirmative obligation to clearly indicate that any picketing will

conform to standards set forth in *Moore Dry Dock*, 92 NLRB 547 (1950). See *Sheet Metal Workers Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007); *United Ass'n of Journeymen, Local 32 v. NLRB*, 912 F.2d 1108, 1110 (9th Cir. 1990). The Board concluded that even without relying on the unqualified nature of the Union's threats to picket, it would have found the violation based on direct evidence of the Union's unlawful secondary objective. [HTML] [PDF]

The Board also adopted the judge's recommended dismissals of allegations that the Union engaged in unlawful conduct toward another neutral employer, including coercive physical conduct, threats of harm, and the attempted inducement of a work stoppage.

(Chairman Liebman and Member Schaumber participated.)

Monmouth Care Center (22-CA-27287, et al.; 354 NLRB No. 2) Long Branch, NJ, April 27, 2009. In this case, the Board adopted the administrative law judge's findings that the Respondents violated Section 8(a)(5) and (1) of the Act by failing to meet with, and timely and completely provide information to, the Union. However, the Board reversed the judge's recommended Order that the Respondents bargain jointly with the Union at least once a week. In so doing, the Board noted that there was a lack of support for this remedy in extant Board precedent, and that the General Counsel neither requested this remedy before the judge nor alleged that the Respondents were a single employer or joint employers. In those circumstances, the Board found that its traditional remedial requirements were sufficient to address the violations found. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charges filed by SEIU 1199 New Jersey Health Care Union; complaint alleged violations of Section 8(a)(1) and (5). Hearing at Long Branch, Oct. 23-26 and Nov. 26, 2007, and Jan. 3 and 14, 2008. Adm. Law Judge Steven Fish issued his decision Nov. 10, 2008.

New York Presbyterian Hospital (2-CA-38512; 354 NLRB No. 5) New York, NY, April 29, 2009. The issue in this case is whether the Respondent violated Section 8(a)(5) of the Act by failing and refusing to furnish the Union with requested information about nurse practitioners working at the Respondent's facility, including both bargaining unit nurse practitioners represented by the Union and nonunit nurse practitioners on the payroll of Columbia University. The Board adopted the judge's finding that the Respondent violated Section 8(a)(5) by failing and refusing to furnish the Union with the requested information, noting that the nonunit information was sufficiently relevant to the processing of a grievance. In

addition, the Board specifically found that the Respondent unlawfully failed and refused to provide the Union with all documents between the Respondent and Columbia University concerning the employment of nurse practitioners. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Stagehands Referral Service, LLC (34-CA-10971, 34-CB-2774; 354 NLRB No. 7) Hartford, CT, April 29, 2009. In this compliance case, the Respondents' exceptions referred to their postthearing brief but they did not submit a supporting brief or refile their posthearing brief as a supporting brief. Thus, the Board's review of the Respondents' arguments was limited to the exceptions document. The Board found no basis for overturning the administrative law judge's findings and adopted the judge. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Adm. Law Judge Steven Davis issued his supplemental decision Jan. 7, 2009.

Susan Oles d/b/a Susan Oles, DMD (28-CA-21951, 22095; 354 NLRB No. 13) Phoenix, AZ, April 30, 2009. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by interrogating and threatening employees about their protected concerted activities, by creating the impression that their activities were under surveillance, by denying vacation pay to two employees because they engaged in protected concerted activities, and discharging an employee because she engaged in protected concerted activities. The Board also adopted the judge's dismissal of the allegation that it discharged an employee for her protected concerted activity. [HTML] [PDF]

Finally the Board found it unnecessary to pass on the judge's finding that the Respondent did not violate Section 8(a)(1) by relocating an employee's work station because any remedy provided for that finding would be cumulative of the Board's finding that the Respondent created the impression that employees were under surveillance.

(Chairman Liebman and Member Schaumber participated.)

Charges filed by Susan Strickland, an individual; complaint alleged violations of Section 8(a)(1). Hearing at Phoenix, Aug. 26-28, 2008. Adm. Law Judge Gregory Z. Meyerson issued his decision Dec. 1, 2008.

Trade Fair Supermarkets (29-CA-28448; 354 NLRB No. 16) Queens, NY, April 30, 2009. The administrative law judge found that the Respondent violated Section 8(a)(3) of the Act by discriminating against employees who were not union members. The Board, in reversing the judge, found that the charge did not support the complaint and dismissed the complaint for this reason without reaching the merits. The charge alleged that the Respondent violated Section 8(a)(3) by discriminating against union supporters; the complaint alleged that the Respondent violated Section 8(a)(3) by discriminating against non-members. The judge found that the complaint allegations alleged "the reverse" of the charge allegations and that the complaint allegations accordingly were not closely related to the charge allegations. However, he declined to dismiss the complaint on this basis, relying on his separate finding that the complaint met the 10(b) statute-of-limitations requirement. The Board, in reversing the judge, first noted that the Respondent did not except to the judge's finding that the complaint allegations were not closely related to the charge allegations. The Board also explained that a complaint must satisfy each of two 10(b) requirements – that is, that complaint allegations be closely related to charge allegations and that the alleged unfair labor practices occurred less than 6 months before the charge was filed. The Board affirmed the judge's finding that the complaint allegations were not closely related to the charge allegations, citing Redd-I, Inc., 290 NLRB 1115 (1988) and Reebie Storage & Moving Co., 313 NLRB 510 (1993), enf. Denied 44 F.3d 605 (7th Cir. 1995) and accordingly dismissed the complaint on this basis. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charges filed by Local 338, Retail, Wholesale and Department Store Union/United Food and Commercial Workers; complaint alleged violation of Section 8(a)(3). Hearing at Brooklyn, from April 8, 2008 through April 30, 2008. Adm. Law Judge Steven Davis issued his decision Sept. 23, 2008.

Venetian Casino Resort (28-CA-16000; 354 NLRB No. 9) Las Vegas, NV April 29, 2009. The Board, in response to a remand of the D.C. Circuit, decided to withdraw its earlier finding that the Respondent had violated Section 8(a)(1) of the Act by summoning the police and asking them to issue trespass citations to peaceful union demonstrators conducting a rally on the sidewalk in front of its facility. "Under the unusual circumstances of this case," the Board did "not believe that it would be a good use of [its] limited resources to determine the lawfulness of the Respondent's call to the police and requests for action. Determining their legality would require the Board to decide difficult legal issues not previously decided by the Board or the courts, and in circumstances where the employees' Section 7 rights have been effectively vindicated." While the Board withdrew its earlier finding that the Respondent violated Section 8(a)(1) by summoning the police, it otherwise reaffirmed its Order in the earlier decision.

In its earlier decision, the Board found that the Respondent violated Section 8(a)(1) by summoning the police and asking them to issue trespass citations to the demonstrators and exclude them from the sidewalk, by repeatedly informing the demonstrators via a recorded broadcast that they were subject to arrest for trespassing, and by telling a union representative, a participant in the demonstration, that he was being placed under citizen's arrest. 345 NLRB 1061 (2005). The D.C. Circuit enforced the portions of the Board's Order addressing the broadcasting of the trespass message and the attempt to effect a citizen's arrest, but held that the Board had failed to consider the Respondent's contention that its summoning the police constituted direct petitioning of the government, and as such was protected by the First Amendment. It is that issue that the court remanded to the Board. 484 F.3d 601 (2007). [HTML] [PDF]

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

El Paso Disposal, L.P. (Operating Engineers Local 351) El Paso, TX April 27, 2009. 28-CA-21654, et al.; JD(SF)-18-09, Judge Burton Litvack.

The Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital (California Nurses Assn.) Maryville and Yuba City, CA April 28, 2009. 20-CA-34194, 34227; JD(ATL)-6-09, Judge William N. Cates.

Empire State Regional Council of Carpenters Local 19 (Hospital Building & Equipment Co.) Middleton, NY April 28, 2009. 2-CC-2748; JD(NY)-14-09, Judge Raymond P. Green.

Copper Craft Plumbing, Inc. Kansas City Plumbing, Inc., a Single Employer and their Alter Egos, KC Commercial Plumbing, Inc. and Studio 36 LLC (an Individual) Kansas City, MO April 30, 2009. 17-CA-24227, 24291; JD(ATL)-8-09, Judge Margaret G. Brakebusch.

Chrysler, LLC (Auto Workers Local 412) Auburn Hills, MI May 1, 2009. 7-CA-51553; JD-16-09, Judge Ira Sandron.

County Waste of Ulster, LLC (Laborers 108) Montgomery, NY May 1, 2009. 2-CA-37437, 2-RC-22858; JD(NY)-15-09, Judge Raymond P. Green.

NO ANSWER TO COMPLAINT

(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.))

Wrangell Seafoods, Inc. (Alaska Fisheries Division of the United Industrial Service Transportation, Professional and Government Workers of North America) (19-CA-31546; 354 NLRB No. 3) Wrangell, AL April 29, 2009. [HTML] [PDF]

Long Beach Press-Telegram (Southern California Media Guild, a Newspaper Guild - Communications Workers of America Local 9400) (21-CA-38484, et al.; 354 NLRB No. 4) Long Beach, CA April 28, 2009. [HTML] [PDF]

Cherry Auto Parts, Inc. (Teamsters Local 20) (8-CA-38029; 354 NLRB No. 10) Toledo, OH April 30, 2009. [HTML] [PDF]

NO ANSWER TO COMPLIANCE SPECIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file a timely answer to the compliance specification.)

Superior Protection, Inc. (United Government Security Officers of America) (16-CA-21399; 354 NLRB No. 12) Houston, TX April 30, 2009. [HTML] [PDF]

NON-COMPLIANCE WITH SETTLEMENT AGREEMENT

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's non-compliance with a settlement agreement.)

Extreme Building Services Corp. (Laborers Asbestos Lead and Hazardous Waste Local 78) (29-CA-24894; et al.; 354 NLRB No. 6) Great Neck, NY April 29, 2009. [HTML] [PDF]

TEST OF CERTIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

Rochelle Waste Disposal, LLC (Operating Engineers Local 150) (33-CA-15765; 354 NLRB No. 18) Rochelle, IL April 30, 2009. [HTML] [PDF]

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)

DECISION AND ORDER REMANDING [proceeding to Hearing Officer]

Saga Chicago Co., Ltd., d/b/a Hampton Inn Chicago-O'Hare International Airport, Chicago, IL, 13-RC-21580, April 28, 2009 (Chairman Liebman and Member Schaumber)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Getronics USA, Inc., East Hanover and Florham Park, NJ and Suffern, NY, 22-RC-12925 April 27, 2009 (Chairman Liebman and Member Schaumber)